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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

GERTRUDE A. SMITHEAL, *Petitioner,*

v.

WILLIAM TOBY SMITHEAL, *Respondent,*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE SECOND SUPREME JUDICIAL DISTRICT AT FORT WORTH, TEXAS

The petitioner Gertrude A. Smitheal respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas.

OPINION BELOW

The opinion of the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth, is reported in the case of *Smitheal* v. *Smitheal* in 518 S.W.2d 842. This affirms the judgment and findings by Judge Robert G. Wright in the Domestic Relations Court at Fort Worth, dated February 21, 1974, awarding custody to the husband's mother, Edna Holderness. The Petitioner, Gertrude A. Smitheal, filed an Application for Writ of Error in the Supreme Court of Texas, which was dismissed for want of jurisdiction. Petition for Rehearing was denied on June 4, 1975. These proceedings are set forth in more detail in the following paragraphs under Jurisdiction.

JURISDICTION

The opinion and judgment of the Court of Appeals affirmed findings and judgment entered by the District Court for Domestic Relations at Fort Worth, Texas, which awarded the custody of Edna B. Smitheal, a minor child, of the Petitioner, age 4 years at the time of the separation, to Edna Holderness, the mother of the husband, and denied custody to the mother, Gertrude A. Smitheal, and to William T. Smitheal, the husband.

The Petitioner, Gertrude A. Smitheal, filed an application for Writ of Error, Case No. B-5189, in the Supreme Court of Texas. The Petitioner filed a Supplemental Record in the Supreme Court showing that William T. Smitheal, who claimed to be the father, was indicted on several narcotics charges, had been convicted of two such felony charges in the Texas Courts for possession and sale of dangerous drugs and controlled substances, and is serving time.

On May 7, 1975, the Supreme Court dismissed the Application for Writ of Error for want of jurisdiction. Petitioner filed a Motion for Rehearing on May 21, 1975, and on June 4, 1975, the Motion was overruled. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1), and Section 1257.

QUESTIONS PRESENTED FOR REVIEW

Questions presented are:

1. Is the No-Fault Divorce Statute, the Family Code of Texas, unconstitutional?

2. Does it deprive the Petitioner of her rights under Articles V, XIV, and Article I, Section 10, to the Amendments to the Constitution of the United States; and of the Texas Constitution, Article I, Sections 15, 16 and 19, *which questions have never been decided in the Courts of Texas,* or in the belief of the Petitioner, by this Court, *this being a matter of first impression in this Court?*

3. Does the judgment below in the No-Fault Divorce action impair the obligations of the marriage contract. The birth of the child and the marriage preceded the No-Fault Divorce Decree, thereby placing a limitation on the State to make a law impairing the obligation of contract?

4. For such reasons, should not the Court have applied Section 4639 of Vernon's Texas Statutes on custody, which provided that the custody be awarded only to the father of mother (not to the grandparent)?

5. Did the decision placing the child with the husband's mother (the wife denies the husband is the

father) deprive the mother, the Petitioner, of her constitutional rights under the foregoing Articles V, XIV, and Article I, Section 10, of the Amendments to the United States Constitution; and Sections 15, 16 and 19, Article I, of the Texas Constitution?

6. Was an error in Substantive Law committed by not applying the old law (Section 4639), depriving the Petitioner of her constitutional rights?

7. Did the Court commit a fundamental error of Substantive Law in not giving effect to the mother preference rule, when it granted custody to the husband's 74-year-old mother, not even a Petitioner or party, against the mother, who was actively, constantly and aggressively seeking control of the child, who is fit and has never been proven unfit, and never charged with being unfit in the proceedings?

8. As a matter of law, was the mother deprived of her constitutional rights by awarding custody to the mother of an admitted adulterer, William T. Smitheal; also where a change of circumstances occurred of his having pled guilty and having been incarcerated for a long period of time for violation of the narcotics laws, and having been sentenced, after which time he resided with the child?

9. Were the mother's constitutional rights violated by the Court's refusing to follow Section 4639 of the old Texas Statute which required the Court to award custody to the father or mother with regard to the prudence and ability of the parents? The mother is a practicing lawyer in a good environment, and is willing to take care of the child at her own expense, the Husband was convicted of selling narcotics, to which he pled guilty and was confined to jail.

10. Was the Court without discretion to award custody to Edna Holderness, the mother of the Respondent, under said statute?

11. Did the Court abuse its discretion in disregarding the documentary evidence of the mother, supported by documentary proof that the father of the child was a white man? The child was born a year prior to the marriage. William T. Smitheal is black. Photographs in the record show the child to be a purely white child with blue eyes and ash blonde hair; the mother is of Norwegian heritage with blue eyes and ash blonde hair. William T. Smitheal is black with curly hair, while the child has straight hair, and there is no resemblance between him and the child. The Court refused the Petitioner's requests for blood tests.

12. Did the unusual procedure in the Texas Court depart so far from the accepted and usual course of Judicial proceedings, or so far sanction such a departure by the lower court as to call for an exercise of this court's power of supervision? (Rule 19)

13. Does the documentary evidence refute the opinion of the Court of Appeals? *United States* v. *Singer Manfg. Co.*, 83 S.Ct. 1773.

14. Has the Court of Appeals in this case decided an important question of Federal law in such a way as to be in conflict with the applicable decisions of the Supreme Court? (Rule 19b)

FACTS WHICH WARRANT THIS COURT'S TAKING JURISDICTION

The Court of Appeals disregarded Section 299 of the Texas Rules of Civil Procedure. It had no findings to go on. It went outside of the judgment of Judge Wright, the Trial Judge. The Court of Appeals quoted evidence on which there were no findings. Rule 299 states that a Judgment may *not* be supported on appeal by a presumption of findings upon any ground or recovery. No elements of the evidence were found or declared by the Trial Court, which is a departure from the accepted and usual course of judicial proceedings.

The case *United States* v. *Singer Manufacturing Co.*, 83 S. Ct. 1773, points out that the findings in the Court of Appeals may be upset by this Court as a matter of law where there is documented evidence to show that the Trial Court was wrong. The Trial Court in the *Singer Manufacturing Co.* case had held that there was no conspiracy to violate the anti-trust law in connection with the sale and distribution of sewing machines. Documentary evidence showed otherwise and was part of the record brought up to the Supreme Court. The Supreme Court held that the District Court's conclusion and facts be corrected as a matter of law, where the documentary evidence clearly showed that the other findings were incorrect. *In our case the documentary evidence is so strong on behalf of the Petitioner,* so adverse to the position of William T. Smitheal, *that we ask this Court to follow the rule in the Singer case* that the findings of Judge Wright should be set aside because the documented evidence clearly shows that Judge Wright is wrong.

The point here is that the Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. Rule 19, (1)(b).

Documentary Evidence in Conflict with Court of Appeals Decision

The exhibits show that the child was taken surreptitiously from the mother on December 27, 1972, on the false story that the husband and his mother were going to see a sick friend, who had been in an accident in Houston, Texas. This was at a time when the mother, husband and child were living in one room together in Fort Worth, Texas, and the mother had saved $8,000.00 from her earnings to buy a family home in Fort Worth, Texas. The bank book is an exhibit to prove the existence of the $8,000.00.

The exhibits show that the mother spent $1,669.91 in telephone calls keeping in touch with the husband and the child while she was earning their living in Denver, Colorado, and protecting the husband, William T. Smitheal, by handling his case. (Appendix to Court of Appeals Brief.) The mother spent $1,677.40 in airline tickets, going back and forth between Fort Worth and Denver. So, the statement in the Court of Appeals opinion that the Petitioner voluntarily surrendered the custody of the child is grossly in error.

The Court of Appeals went outside Judge Wright's opinion and endeavored to make innacurate findings to try to justify its decision. The only stated basis for Judge Wright's decision, in his opinion, is that it was for the best interests of the child to leave her with the husband's mother.

The supplemental record shows that the husband, William T. Smitheal, has been charged with half a dozen narcotics violations, has pled guilty to two felonies for sale of narcotics and was sentenced. These events unmistakenly show that the Trial Court's findings as to the best interests of the child are erroneous.

The Court of Appeals statement that William T. Smitheal and his mother, Edna Holderness, took care of the child's needs and did all the work, and that the Petitioner-Mother did nothing for the child is diametrically opposed to the evidence.

The list of uncontroverted facts consists of 19 undisputed facts attached to the Petitioner's Brief in the Court of Appeals and shows that she made substantial contributions to the husband, the baby, and to the husband's entire family, and that the husband was unemployed most of the time. The mother spent substantial sums of money on telephone bills and on airline fares. Such show that the statement in the Court of Appeals' opinion is not based on the evidence in this case.

To refute the unwarranted statement of the Court of Appeals that William T. Smitheal and his mother, Edna Holderness, took care of the child's needs and did all the work, we have attached Exhibit 13 to the Appendix.

This Apendix was attached to the brief of the Petitioner in the Court of Apeals. It shows the various items paid out by the Petitioner for the support of the child and the family.

Had the Court of Appeals taken the time and trouble to really review the documentary facts they would not have written the opinion they did. The only explanation

for the opinion is prejudice. *Prejudice-the prejudice of the South against any white woman who would marry a black man.*

Prejudice is the spider of the mind.
It is the womb of injustice...

The opinion even states that William T. Smitheal is a high school graduate who lacks 20 hours of having a college degree. This does not come from the Statement of Facts and is not a fact.

The supplemental record contains newly discovered evidence of several narcotics charges being filed against William T. Smitheal, and of his indictment before a Grand Jury and conviction on two felony charges. The Court of Appeals did not realize that part of his education—which never occurred in college—was to be administered to him in the Tarrant County Jail.

The opinions of the Trial Court and the Court of Appeals are not based on the facts and the law. They are opposed and contrary to the facts and the law, and the only explanation is that the Judges are swayed by prejudice; by an inborn subconscious conviction that a white woman who marries a black man should be punished, and the punishment meted out is what she deserves. Unfortunately, the child's constitutional rights are violated by this erroneous concept.

CONSTITUTIONAL AND STATUTORY PROVISIONS RELIED ON

Article 1, Section 10 of Amendments to U.S. Constitution

Article V of the United States Constitution

Article XIV of the Amendments to the Constitution of the United States.

Preamble to the United States Constitution, providing for the promotion of general welfare, to secure the blessings of liberty, for ourselves and our posterity.

The Declaration of Independence, granting life, liberty and the pursuit of happiness.

Article I, Sections 16 and 19 of the Texas Constitution.

Vernon's Family Code, Vernon's Texas Codes, Annotated, known as the Family Code, 1974 Amendments, containing the custody law.

Article 1728, Subdivisions 2, 3 and 6, Vernon's Statutes.

Section 3.55, 63rd Legislature of Texas, Chapter 543, SB 168.

Paragraph 1407, New Custody Law of the Family Code, adopted January, 1974.

Article 4639, Vernon's Texas Statutes.

PART I

STATEMENT OF THE CASE

This case is unique in that insofar as counsel has been able to ascertain, the No-Fault Divorce Law now in effect in many states *has never been before this Court for review,* nor passed on by the Supreme Court of Texas or the Texas Court of Appeals.

We consider this issue to be one of *national importance.* In our research we have found no case where the question of the validity of the No-Fault Divorce Statute of any state is drawn in question on the ground of it's being repugnant to the Constitution (Article V, Article XIV, and Article I, Section 10 of the United States Constitution; Section 1257).

This case is unique in that a mother who is not charged with wrongdoing, where there is no finding by the Trial Judge that she has been guilty of any wrongdoing, is deprived of a 4-year-old child's custody in a Decree under a No-Fault Divorce, giving custody to a black husband (or even a white husband) where the marriage occurred after the birth of the child, and the marriage was prior to the No-Fault Statute.

In this case, questions were properly raised in the Trial Court that the application of the No-Fault Statute to a marriage which occurred prior to its passage is an unconstitutional application of the law.

This case involves the constitutionality of the Family Code of Texas, which became effective January 1, 1970. This is commonly known as the No-Fault Divorce Statute. It also involves the constitutionality of the 1974 Custody Act passed by the Texas Legislature as a part of the Family Code.

Appellant and Appellee were married on November 18, 1969, at Raton, New Mexico. Under the laws of New Mexico a divorce could only be granted if one party gave grounds for a divorce. A No-Fault Divorce Law was not the law of the place of contract. The No-Fault Divorce Law was not the law of the forum in Texas at the time the marriage was contracted, and at that time it was necessary for a person to prove grounds for a divorce before their marriage could be terminated.

A child, Edna Smitheal, had been born approximately a year prior to the marriage, on November 14, 1968.

In December of 1972, the mother and William T. Smitheal were living in one room in Fort Worth, with the child. William T. Smitheal, on misrepresentation that he had to go to see a sick relative with his mother, took the child from the home and filed a surprise divorce action six days later, and the child was concealed from the mother. William T. Smitheal's mother, Edna Holderness, returned to the home on January 8, 1973, and informed the mother that she had been sued for divorce and she would never see her child again.

The husband then retained possession without an Order of Court until November 3, 1974, when the divorce action was heard. Prior to the trial the husband filed a false charge against the wife, who had been given rights of visitation with the child, that the child was molested, and for a period of time the wife was only able to see the child in an orphanage for two hours a week. She, during that period of time, traveled from Denver, Colorado, where she was practicing law and

working, to Fort Worth on every visiting period until the doctor and the Social Worker, Mrs. Carmelita Love, reported that the charge was false and she was restored to her visitation rights. During the latter part of this time the mother also maintained an apartment in Fort Worth, abandoned her law practice in Denver, and remained in Fort Worth in an effort to gain custody of her child.

At the trial the mother vigorously contended that the No-Fault Divorce Action *did not apply; that the claim of the husband that the marriage was unsupportable was not grounds for divorce, but that a divorce had to be proven* since it was not one of the grounds for divorce at the time of the marriage. She charged the husband, and proved it according to the admissions of the child, the Social Worker and the husband, that he was guilty of adultery before the very eyes of the child; she charged him with cruelty and non-support, which were grounds under the old statute, Article 4639 of Vernon's Texas Statutes. The case was continued for trial from June, 1973, to November, 1973, due to an alleged illness of the husband's lawyer or the lawyer's family.

At the trial, *the Court awarded a Decree on a No-Fault* ground, disregarded the wife's evidence—which had been proven as to adultery, non-support and cruelty—and awarded the custody of the child, who was 4 years of age at the time the action began, not to the Petitioner or her husband, but to the husband's mother, Edna Holderness, on the ground that the child had been there so long. During part of this time litigation was pending. The wife appealed the decision of the Trial Court to the Court of Appeals. She again contended in the Court of Appeals that the contract of

marriage had been impaired; that the No-Fault Divorce should not have been entered because of the law at the time the action was filed; that the No-Fault Divorce Action was unconstitutional because it destroyed the family relationship and contained many features making it unconstitutional.

The Court of Appeals affirmed the Decree of the lower Court. The Appellant promptly moved the case to the Supreme Court of Texas. The Court did not find that the wife had made any improper or wrongful acts. The visitation rights have continued until the present time, the custody having been awarded to the husband's mother, Edna Holderness. The wife was required to pay support for the child. The husband resides in the home with his mother. Since that time a charge was filed that he was selling narcotics, he was arrested and has spent six months in jail, during which time the child still resided with the then 74-year-old mother of the husband (she is now 76 years old).

The wife filed a Petition for Writ of Error in the Texas *Supreme Court.* In that case she alleged again the failure of the husband to support the child. *She again alleged that the No-Fault* Divorce Act *was unconstitutional;* that it did not apply. She showed that she had done absolutely no wrong during the marriage. The *Texas Supreme Court denied jurisdiction.* She then filed a Petition for Rehearing, which was overruled on June 4, 1975.

In *Smitheal* v. *Smitheal,* 518 S.W.2d 842, the present case, *the Court of Appeals ruled that no fault Divorce Law was properly applied even where the marriage pre dated that law.*

This ruling represents a decision by the state in a way not in accord with the applicable decisions of this Court, making Rule 19(1)(a) applicable. The decision that no fault divorce law applies to a marriage contracted before the no fault statute was passed conflicts with the Dartmouth college case (supra) Rule 19(1)(b).

In this connection *marriage is a contract*

> "according to the form prescribed by law, by which a man and woman capable of entering into a contract agree with each other to live through their whole lives together in a state of union which ought to exist between husband and wife." Blackstone Commentaries of Husband and Wife, p. 433. Chapter 13.

PART II

STATEMENT OF THE CASE SHOWING MANNER IN WHICH THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED

In the Application for Writ of Error in the Texas Supreme Court, under "Statement of Jurisdiction", Pages 1 through 7, there appear essentially the same points which were previously raised in the Statement of Points in the Appellant's Brief in the Court of Appeals. It again raises the unconstitutionality of No-Fault Divorce Statute, the applicability of Section 4639 of Vernon's Statutes, and the principles of *Dartmouth College* v. *Woodward,* 4 Law Ed. 504, impairment of obligation of contract.

These questions are again raised in the Points of Error, in Pages 8 through 11 of the Application for Writ of Error, and again in the Brief, which alleged that the Family Code was unconstitutional, and was also set forth in the Addendum as the end of the Application for Writ of Error.

The principles of the *Dartmouth College* v. *Woodward*, that a state cannot impair the obligations of a contract, were raised in Trial Court at the beginning of the trial (see Page 4 of the Statement of the Facts, per designation in Texas). William T. Smitheal was on the stand to testify concerning the fact that the marriage was insupportable (the Texas No-Fault ground). The Petitioner objected on the grounds that the marriage took place prior to the passage of the No-Fault Marriage Act. The parties were married under the old statute and contemplated the old statute, and insupportable grounds were not then in existence. She also raised the unconstitutionality of the No-Fault Divorce Act. The Judge stated, on Line 23, Page 4, "Your objection is overruled". This point was again raised on Page 356 of the Statement of the Facts that the Decree provided that the divorce was granted on the grounds that the marriage was insupportable, which insupportability was not a ground at the time of the marriage.

On Page 356 of the Statement of Facts in the instant case, the Court was told that the mother had committed no wrong and was not to be deprived of the custody of the child, and it was unfair that she be subjected to a No-Fault Divorce, and that she had proven that the Husband was guilty of adultery (Lines 12 through 25, Page 356). These objections were overruled on Page 357. It was argued that the Court erred in applying the Family Code to this case and in granting a divorce on the grounds that the marriage was insupportable. It was not applicable to a marriage which occurred in November, 1969—prior to passage of the Act. The objections on Page 8 of the Points Relied On made a divorce on No-Fault grounds.

The Appellee, William T. Smitheal, in his Brief before the Court of Appeals, acknowledged that the Appellant Mother had argued in Points 2 and 3 that the Court should have applied the law existing at the time of the marriage, and not at the time the case was filed (Page 3 of William T. Smitheal's Brief).

On the last page of the Application for Writ of Error is an Addendum which alleges that the Family Code is unconstitutional and lists the cases sustaining the wife's position that the judgment and application of the new law impaired the obligation of the contract, citing *Trustees of Dartmouth College* v. *Woodward,* 4 Law Ed. 514; *Fletcher* v. *Peck,* 6 Law Ed. 68, 16 A.J. 2nd, Section 101, Page 384; *Piper Bank,* 16 A.J. 2nd, Constitutional Law, Page 792.

In the Petition for Rehearing under the heading, "Constitutional Questions Are Involved", the constitutionality of the violation of the Fourteenth Amendment is argued. The application of the Family Code was alleged to be unconstitutional. The impairment of the obligation of contract was argued. We argued that the Court had jurisdiction under Article 1728 of Vernon's Statutes of Texas. These citations are set forth in the Appendix.

FURTHER REASONS AND ARGUMENT FOR ALLOWANCE OF THE WRIT

1. The Constitutionality of the Family Code, as Amended in the Lower Court.

The child, Edna, was born on November 14, 1968. Petitioner and Respondent were married on November 18, 1969. The divorce action was filed on January 3, 1973. The Trial was set for June, 1973.

The marriage was a contract; the State was a third party and an interested party in preserving the marriage relationship. There is a great body of law to sustain this statement. The husband brought an action under the No-Fault Law, which Law did not become effective until January 1, 1970, and the new custody provisions did not become effective until January, 1974. The Court granted a Decree under the No-Fault Law over the persistent objections of the wife. The husband, surreptitiously and without warning, had removed the child from the home, and had retained the child in his possession without a Custody Order from December, 1972, until the time the Decree was granted.

A substantial constitutional question is involved because under the old law the husband would have been required to prove the wife guilty of one of the grounds for divorce instead of simply stating that the marriage was insupportable under the new law. He did not establish any wrongdoing on the part of the Petitioner herein, there was no wrongdoing, and the Court found none on the part of the wife. There is nothing whatever in the final Judgment of the Trial Court to indicate any grounds for taking the child from the mother and none was proven.

Under the old law, Section 4639 of Vernon's Texas Statutes, the Court was required to "give the custody and education of the children to either the father or mother, as the Court shall deem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the children. This was not followed. The mother's rights were substantially denied. Her rights to custody were altered on account of the difference in the old law and the new law. The new code, under custody, does not contain the strict pro-

visions that under the Decree, the custody must go to the mother or father, or that the custody must be awarded according to the prudence and ability of the parents. The Court is given greater discretion under the new law. The *rights of the mother were substantially prejudiced by deciding the case under the new law,* instead of the old. *Morgan* v. *Morgan,* 507 P.2d 409 (Ore.)

The custody went, not to the father or mother, but to a then 74-year-old (Court of Appeals says 76) grandmother at the time. The Supplemental Record shows that the husband, after the hearing in the Court of Appeals, was incarcerated for violation of six narcotics charges, two of them felonies; he was indicted, pled guilty and served time. This denied the statement of the Court that the best interests of the child were with the paternal grandmother. The husband and the grandmother live together in a black area. A white child with blue eyes and ash blonde hair is the subject of the instant case.

The picture of the child and mother are in the record, substantiating the undisputed testimony of the mother that the husband was impotent. The Court refused to allow a blood test at the request of the mother.

2. Substantial Federal Questions Are Clearly Involved Here.

The wife was deprived of the companionship, the custody and the right to raise her child; was divested of her property rights under the Fourteenth Amendment. She was required to support the child, though no Support Order was entered on the husband, and the husband is allowed to enjoy the companionship of the child, when he is not in jail on narcotics charges.

These facts constitute a direct deprivation of the mother's property rights, marital rights, custody and enjoyment of the child, and the right to raise the child under Articles Five and Fourteen of the Amendments to the Constitution of the United States, and of the Texas Constitution, Article I, Sections 15, 16 and 19. This is also a deprivation of the child's rights.

Section 4639 of the old Vernon's Statutes is applicable, but never given credence. The limitations of that Statute on custody were never given credence, the showing of adultery of the husband, was never given credence, all because of the change to the No-Fault law.

Marriage is a contract. The marriage of the husband and wife in this case is a contract. He could not steal her child, take the child from the home occupied with him, and her, and sue her on a No-Fault divorce on the grounds the marriage was unsupportable under the old law. He could and did under the new law. Not only are the rights of this mother and the sanctity of the marriage relationship in the United States gone with the passage of this new statute, but also, the Courts should be vigilant to protect the marriage, and they have in the past been vigilant to protect it. It is held for naught under this new law, wrecks the sanctity of the marriage relationship. This detracts from the stabilization of the family life. Who can say that the questions involved here are not substantial? Under the No-Fault law, the decision in this case is a grievous error. The decision could not have been rendered under the old law Section 4639. Even William Smitheal's witnesses had good recommendations for Gertrude Smitheal according to Mrs. Love, the social

worker. It was brought out that she had done nothing wrong, and she supported the family during the time the family lived together. And she has still been deprived of the rights of motherhood.

The obligations which William Toby Smitheal assumed at the time the contract was entered into included the requirements that he would have to prove her guilty of wrongdoing before he could get a divorce and take the child from her in the fashion which occurred here. The No-Fault law, the subsequent action of the Court impaired the obligations and rights and altered such rights and obligations under the new law. The case comes within the prohibitions of *Trustees of Dartmouth College* v. *Woodward,* 4 Law Ed. 514, which sets forth sound principles still the law in this country. To the same effect is *Piqua Branch of State Bank of Ohio* v. *Knopp,* 14 Law Ed. 368, and *Fletcher* v. *Peck,* 6 Law Ed. 86. Under *Fletcher* v. *Peck* the State cannot alter laws governing the remedy on a contract where it lessens or impairs the value of the remedy to lessen and impair the value of the contract. Such a law is void. In *Spindel* v. *Spindel* 283 F.2d 811, the District Court for the Eastern District of N.Y. has held that a Federal Court, under the diversity statute, has jurisdiction to declare a divorce decree invalid.

The Texas Court should have taken jurisdiction pursuant to the Subdivisions 2, 3 and 6 of Article 1728 of the Texas Statute. The Texas Court did take jurisdiction of the case involving a $190.00 mule, where the liability depended upon the construction of the Statute. See *Simmons* v. *St. Louis Railway Co.,* 91 S.W. 2nd, 332. *In this case where the child's welfare, rearing, education and environment are involved, apparent-*

ly her welfare was not as important to the Texas Courts as that of a $190.00 mule.

The No-Fault divorce law is wanting of a solid foundation in law and in logic.

With it our Courts give no incentive to a diligent parent for the protection of fundamental rights . . . . not when fundamental rights are taken away by the very legislature itself.

Such a law clearly and unmistakably deprives a law abiding spouse who has given birth to her children with the belief that she had acquired a social status, recognizable by the state as a sacred and preferential status under the equal protection of the laws. She, being a just spouse, thinking she was entitled to the honored status of the mother preference rule as it existed since Blackstone's time, finds herself with absolutely no protection against a jailbird, and felon, and unfaithful husband who has violated the laws of decency concerning his fellowmen in selling them narcotics that reduced them to mere animals.

She has no equal protection under this new No-Fault law. He has every advantage by merely going into Court, laying aside his faults at the courtroom door and saying to the judge . . . "grant me this divorce, the marriage is 'insupportable.' " Section 3.01 Family Code. No sooner said than done, divorce granted.

Where is the equal protection of the laws?

Also, in such a situation, the law abiding wife is deprived of due process of law. She is unjustly deprived of her marriage status through no fault of her own, and of her property right in her child. *Boddi* v. *Connecticut,* 91 S.Ct. 781.

The Declaration of Independence sets forth one unalienable right . . . which has been violated by the No-Fault law . . . the spouse.

A law abiding spouse who has done no wrong is deprived of her marriage status . . . and her mother's preferential right to the child, and by such procedure is deprived of "life and the pursuit of happiness" guaranteed by the Declaration of Independence. Such declaration also states whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it. The law violates Article XIV of the amendments to the Constitution providing "that no state shall deprive any person of life, liberty or property without due process of law nor deny to any person equal protection of the laws.

The Court should not be fooled by the fancy label "no fault" which is the name of the instant statute. The Court rather should be sensitive to the gross injustice to the mother and to the children who are deprived of valuable property rights. This no fault leads to broken homes, resulting in hapless families on relief, multiplying the economic ills of our country and increasing the number of hopeless derelicts on skid row. Many hopeless derelicts have given up hope smarting from an unjust divorce and the loss and companionship of their children with no hope left.

The law abiding mother is deprived of the inalienable rights guaranteed by the Declaration of Independence and our Constitution, and is deprived of life, liberty, and the pursuit of happiness, and of her property in the child.

There is a statement on one of our post office buildings which says that "the law is nothing but common

sense." The No-Fault divorce statute does not make common sense.

Our domestic jurisprudence has been developed through the years on the principle that the child stays with the mother unless she does something wrong . . . No-Fault is the only law which takes that right away.

The new *No Fault divorce law has reduced the woman, wife, and mother to a mere tenant at sufferance in the family home, it reduces her right to security of the marriage and to companionship and right to raise her children.*

Case of *Rozell* v. *Kaye,* 201 F.2d 377, U.S. Dist. Ct. (Texas) supports principles of our Constitution, that no state shall impair the obligation of contract. The Court in that case held that service of process statute on non-residents, did not apply retroactively to a cause of action arising prior to enactment and effective date of the statute. Precisely the same question is argued here.

The mother and the child had vested legal rights under the old law. "But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power." *Fletcher* v. *Peck,* Chief Justice Marshall, Law ed., 9-13. Where right to damages has vested, repeal of statute giving them cannot destroy that right, that is beyond scope of legislative power. *People* v. *Supervisors of Westchester Co.,* 4 Barb. 64.

The final Judgment for Divorce of Judge Wright, rendered February 26, 1974, drawn by William Smitheal's attorney, contained no finding that the mother, Gertrude Smitheal, Petitioner herein, during the mar-

riage has done anything wrong or even committed any act of indiscretion.

Gertrude Smitheal, mother of the child, handled heavy litigation for William Smitheal as his attorney to save him from going to jail after failure to pay $5,000.00 in alimony to a prior wife in Denver. She also tried to save William Smitheal's interest in a house in Denver, and she took his case through the Court of Appeals in Colorado. (There is not one remark of the Judge that Gertrude Smitheal has been anything but a good and dutiful mother and wife. She supported the family (William Smitheal was out of work most of the time).

Any findings by the Court of Appeals are remote, conjectural and inaccurate. The opinion goes outside of the opinion of Judge Wright in an effort to try to find a basis of sustaining the Judgment.

She never at any time voluntarily surrendered custody of the child. The files so stated in the Court of Appeals opinion. The Exhibits show the child was taken surreptitiously from the mother on December 27, 1972, on the false story that the husband and his mother were going to see a sick friend who had been in an accident in Houston, Texas. This was at a time when the mother, husband and child were living in one room together in Fort Worth, Texas, and she had saved $8,000.00 from her earnings to buy a family home in Fort Worth, Texas. The bankbook is an Exhibit.

The Exhibits show the telephone calls (Appendix to Court of Appeals Brief) that she spent $1,669.91 in telephone calls, keeping in touch with the husband and the child while she was earning their living in Denver, Colorado, and protecting him by handling his case.

She spent $1,677.40 in airline tickets, going back and forth between Fort Worth and Denver. So, the statement in the Court of Appeals opinion that the Petitioner voluntarily surrendered the custody of the child is grossly in error.

The Court of Appeals went outside Judge Wright's opinion and endeavored to make inaccurate findings to try to justify its decision. The only stated basis for Judge Wright's decision in his opinion is that it was for the best interests of the child to leave her with the husband's mother.

The husband was to live in the same home. The supplemental record shows the husband has been charged with a half-dozen narcotic violations, has pled guilty to two felonies for sale of narcotics and sentenced.

The Texas Courts have so far departed from the accepted course of judicial proceedings as to call for exercise of this court's power of supervision. (Rule 19)

When the Court of Appeals found no findings in the Decree of Judge Wright, they disregarded Section 299 of their own rules. This stated that a Judgment may not be supported on appeal by a presumption of a finding not found by the Trial Court. The only finding of the Trial Court was that the best interest of the child was that it be with Edna Holderness. The pleadings did not charge the mother with being unfit and there was no evidence that she was unfit.

A Party Who Has Burden of Establishing an Ultimate Fact Will Be Held in Absence of a Finding Thereon or Request for a Finding To Have Abandoned That Ground of Recovery.

Doubts regarding ultimate facts will NOT be resolved in favor of upholding a judgment although it is different with merely evidentiary facts. *Mayor* v. *Breeding,* 24 S.W.2d 542.

This case involved the presumption that property bought during marriage is community property.

There is a mother preference rule on custody.

Where trial court did not specifically find in its findings that farm had been abandoned as a homestead, or did court conclude in its conclusions of law that it was abandoned nor one of the elements of abandonment it could not be presumed in support of judgment against party claiming a homestead. *White* v. *Edwards,* 1966, 399 S.W.2d 935.

Appellate court is required to appraise judgment in light of findings actually made and it *cannot presume* a different finding in favor of judgment where it has not been made.

Where property is damaged and loss could be occasioned by two separate causes one covered one not covered BURDEN IS ON INSURED TO SHOW OMISSION FROM JUDGMENT OF WORDS TO WHICH DEFENDANT EXCEPTS DID NOT CONSTITUTE WAIVER ON PART OF DEFENDANT OF RIGHT TO APPEAL FROM JUDGMENT WHICH RECITED THAT DEFENDANT GAVE NOTICE OF APPEAL IN OPEN COURT. Nor are the findings of fact in a case tried without a jury conclusive on appeal although not excepted to where a statement of facts appears in the record as in the instant case. *Hanover Insurance Company* v. *Sonfield,* 366 S.W.2d 160.

RULE REQUIRING FINDING OF FACT UPON ALL GROUNDS OF RECOVERY IN ORDER TO FORM A BASIS OF JUDGMENT, PROHIBITS SUPPORT OF JUDGMENT BY IMPLIED FINDINGS WHERE NO ELEMENT OF GROUND OF RECOVERY HAS BEEN FOUND BY TRIAL COURT. *Jack Ritter, Inc. Oil Co.* v. *Fred Bandas,* Jan. 1965, 387 S.W.2d 70.

In *Swanson* v. *Swanson,* 228 S.W.2d 156, it was held that the Court of Appeals could not go outside of the finding of facts to hold against the appellant.

To same effect see *McKenzie* v. *Carte,* 385 S.W.2d 534.

There is not one remark of the judge that Gertrude Smitheal has been anything but a good and dutiful mother and wife. She supported the family. William Smitheal was out of work most of the time.

Any findings by the Court of Appeals are remote, conjectural and inaccurate. The opinion goes outside of the opinion of Judge Wright in an effort to try to find a basis of sustaining the judgment. The Court of Appeals opinion attached admits Gertrude Smitheal was a fit parent.

She never at any time voluntarily surrendered custody of the child, as stated in the Court of Appeals opinion. *The Exhibits show the child was taken surreptitiously.*

The final judgment for divorce of Judge Wright rendered February 26, 1974, drawn by William Smitheal's Attorney, contains *no finding that the mother, Gertrude Smitheal,* petitioner herein, during the marriage *had done anything wrong* or even committed any act of indiscretion.

A Court of Appeals opinion also is predicated on the basis that the Trial Court did not have to find the mother unfit to award custody to a third person, Mrs. Holderness.

The opinion is most unusual in that it goes far beyond the statements of Judge Wright's opinion, and attempts to set up new facts which it considers as grounds for affirming Judge Wright's judgment. It endeavors to recite evidence and conclusions which are incorrect and not in the record. It recites that William Smitheal and his mother did all the work and raised the child, and Gertrude Smitheal did nothing. For these reasons the opinion indicates Judge Wright's judgment should be affirmed. The basis for these statements is not the facts in this case.

The real truth is that Gertrude Smitheal, mother of the child, handled heavy litigation for William Smitheal, as his attorney to save him from going to jail for failure to pay $5,000 alimony to a prior wife in Denver, Colorado, and to try to save William Smitheal's interest in a house in Denver.

CONCLUSION

The opinions of the Trial Court and the Court of Appeals are not based on the facts, and the law. They are opposed and contrary to the facts and the law, and the only explanation is that the Judges are swayed by *prejudice;* by an inborn subconscious conviction that a white woman who marries a black man should be punished, and the punishment meted out is what she deserves.

But, the child's constitutional rights and the child's best interests are overlooked and destroyed in the opinion of the Trial Judge and the Court of Appeals.

Both the Mother and the Child were denied equal protection of the laws. XIV Amendment to the United States Constitution.

We respectfully pray that this Honorable Court grant Certiorari and the Judgment of the law be reversed.

Respectfully submitted,

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Telephone No.: 534-5175

APPENDIX

APPENDIX

Declaration of Independence

* * *

We hold these truths to be self-evident:—that all men are created equal; that they are endowed by their Creator with certain *unalienable rights; that among these are life, liberty, and the pursuit of happiness.*

* * *

Amendments to Constitution of the United States

ARTICLE I

§ 10. Powers denied individual states.—(1) *No state shall pass any . . . law . . . impairing the obligation of contracts, ...*

ARTICLE V

—No person shall be . . . deprived of life, liberty, or property, without due process of law.

ARTICLE XIV

§ 1. Citizenship defined—privileges of citizens. *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.*

No. DR-4-47725

IN THE MATTER OF THE MARRIAGE OF WILLIAM TOBY SMITHEAL AND GERTRUDE A. SMITHEAL AND IN THE INTEREST OF EDNA SONJA SMITHEAL A CHILD

IN THE DOMESTIC RELATIONS COURT NUMBER FOUR OF TARRANT COUNTY, TEXAS

Final Judgment for Divorce

On the 6th day of November, 1973, came on to be heard the above cause; came the Petitioner and Respondent in

person and by their attorneys of record and all parties announced ready for trial; and

The matters of fact as well as of law were submitted to the Court, and the Court after reading the pleadings and hearing the evidence is of the opinion and so finds that the parties should be granted a divorce from each other and further finds and orders as follows:

The Court further finds that the parties agreed in open Court that each party retain as their separate property that property both real and personal in their respective possession and under their control and that any interest the Petitioner may have in or acquired in any real property or other property owned by the Respondent, GERTRUDE A. SMITHEAL, should be divested out of him and awarded to the Respondent.

The Court further finds that there was one child born to the Petitioner and Respondent, EDNA SONJA SMITHEAL, born November 14, 1968, and that subsequent thereto the parties married each other and the evidence is such that the said EDNA SONJA SMITHEAL is the legitimate child of the marriage of the Petitioner and Respondent and the Court so holds.

The Court further finds that it is to the best interest of the said EDNA SONJA SMITHEAL that her legal and physical custody be awarded to MRS. EDNA HOLDERNESS, the paternal grandmother of said child with visitation rights on the part of the Respondent as hereinafter ordered and that Respondent pay child support as hereinafter ordered.

It is, therefore, ORDERED, ADJUDGED and DECREED that Petitioner and Respondent be and they are hereby granted a divorce from each other and the bonds of matrimony heretofore existing between the Petitioner and Respondent be, and the same are hereby forever dissolved, cancelled and for naught held; and the parties henceforth shall be taken and

considered as separate and distinct persons unconnected by any nuptial union or civil contract whatsoever.

It is the further ORDER of the Court that the Petitioner and Respondent be and they are hereby awarded the property both real and personal which is in their respective possession and under their respective control and any interest that the Petitioner owns or may have acquired in any real or personal property owned by the Respondent, GERTRUDE A. SMITHEAL, is hereby divested out of the Petitioner and vested in the Respondent free from any claims of the Petitioner.

It is the further ORDER, JUDGMENT and DECREE of the Court that the legal custody and possession of the said EDNA SONJA SMITHEAL, minor child of the parties, be and the same is hereby awarded to and vested in EDNA HOLDERNESS, the paternal grandmother of said child, with visitation rights on the part of the Respondent as follows: That the Respondent, GERTRUDE A. SMITHEAL, shall have the child with her during the summer months from one week after the closing of the public schools of the city of Fort Worth, Texas, until one week before the opening of the schools in Fort Worth, Texas, and in addition thereto is to have said child with her for one half of the Christmas holidays and any other weekend when she is able to be in the Fort Worth area provided that it is no more than one weekend visit per month. Transportation for child's visits to be paid by the Respondent.

It is the further ORDER of the Court that the Respondent pay the sum of FIFTEEN DOLLARS ($15.00) per week as child support for the support of the said EDNA SONJA SMITHEAL, minor child of the parties. The first payment to be made on the first Month after the entry of this judgment and a like sum on each succeeding month thereafter until said child reaches the age of 18 years or changed by the further order of the Court. Said child support to be paid to the Collector of Child Support of Tarrant County, Texas, his suc-

cessors and assigns in office, who, upon receiving any payments under this order, shall pay them to the said EDNA HOLDERNESS for the support of said minor child.

To which action of the Court the Respondent expects and hereby gives notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas located at Fort Worth, Texas.

Signed this 21st day of February, 1974.

ROBERT L. WRIGHT
Judge of the Domestic Relations Court Number Four of Tarrant County, Texas

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GERTRUDE A. SMITHEAL, *Appellant,*

v.

WILLIAM TOBY SMITHEAL, *Appellee.*

No. 17572.

COURT OF CIVIL APPEALS OF TEXAS, FORT WORTH.

Jan. 24, 1975.

Rehearing Denied Feb. 21, 1975.

Husband sued his wife for divorce and for custody of child and wife cross-acted for divorce and for custody of child. From a judgment entered in the Domestic Relations Court No. 4, Tarrant County, Robert L. Wright, J., wife appealed. The Court of Civil Appeals, Brewster, J., held that general rule is that legal right of custody of child rests in parents, but courts *can terminate that right and award custody of child to a third party without first adjudging parents to be unfit, where it is in the best interests of the child to do so;* that court's action in awarding child's

custody to paternal grandmother instead of to one of its parents was not unlawful as in violation of statute that court shall have power in divorce suit to give custody of children to either father or mother; that trial court did not abuse its discretion in awarding custody of child to maternal grandmother to whom parents had voluntarily surrendered custody of child for considerable period of time; and that court properly applied law in effect at time child was born and at time of marriage determining question of custody of child.

Judgment affirmed.

1. Parent and Child

General rule is that legal right of custody of child rests in parents, but courts can terminate that right and award custody of child to a third party without first adjudging parents to be unfit, where it is in the best interests of the child to do so.

2. Parent and Child

Where parents voluntarily surrendered custody of their child to third person and left its custody there for a considerable period of time and later sought to regain custody of that child, primary question to be decided was what would be best interests of child.

3. Infants

Decision in a child custody case is matter that lies within sound discretion of trial court, and trial court's decision will not be disturbed on appeal unless record shows that trial court abused its discretion in making the custody award.

4. Divorce

Court's action in divorce case in awarding child's custody to paternal grandmother instead of to one of its par-

ents was not unlawful as in violation of statute that court shall have power in divorce suit to give custody of children to either father or mother. Vernon's Ann.Civ.St. art. 4639.

5. Appeal and Error

Where no findings of fact or conclusions of law are filed in nonjury case by the trial court, appellate court must affirm judgment of trial court if it can be upheld on any legal theory that finds support in evidence.

6. Appeal and Error

Where no findings of fact or conclusions of law are filed in nonjury case, trial court's judgment implies that all necessary fact findings were made by trial court in support of judgment.

7. Appeal and Error

In determining whether there is any evidence to support judgment and implied findings of fact incident thereto, appellate court can consider only that evidence that is most favorable to issue and must disregard entirely that which is opposed to it.

8. Divorce

In divorce suit, trial court did not abuse its discretion in awarding custody of child to maternal grandmother to whom parents had voluntarily surrendered custody of child for considerable period of time.

9. Divorce

Each state, acting through its legislature, has exclusive right and power to regulate, control and prescribe and change conditions for a divorce of those residing within its territorial limits.

10. Divorce

In divorce suit, court did not err in applying new no fault divorce law, despite contention that law in effect at time of marriage in sister state should be applied in determining right to divorce. V.T.C.A., Family Code § 3.01.

11. Divorce

In divorce suit, even if the court applied wrong law in determining whether husband was entitled to divorce, prejudicial error was not shown, where wife also asked to be divorced and urged grounds which were grounds for divorce under old law, court granted wife divorce and also granted husband a "no fault" divorce which also terminated marriage. V.T.C.A., Family Code § 3.01.

12. Divorce

In divorce suit, court properly applied law in effect at time child was born and at time of marriage in determining question of custody of child.

13. Bastards

In divorce suit, wife's own admissions were sufficient evidence to support finding that husband was father of child.

14. Divorce

In divorce suit, record did not show an abuse of discretion by trial court in its application of rules of evidence or in its consideration of evidence.

15. Divorce

In divorce suit, record failed to establish that basic fundamental constitutional rights of mother and child were violated and disregarded or that there was individious discrimination.

16. Divorce

Whether court was right or wrong when it ordered, without a hearing, that further visitations with mother be postponed until hearing be had on claim that child had bruises on it which could have resulted from molestation, order could not constitute reversible error in divorce suit, since, although it did affect mother's visitations during pendency of suit, it did not affect judgment being appealed.

17. Judges

In divorce suit, record failed to support contention that trial court was prejudiced against wife because she married husband, a black man.

Robert L. McDougal, Denver, Col., for appellant.

Garland Flowers, Fort Worth, for appellee.

OPINION

BREWSTER, *Justice.*

William Toby Smitheal sued his wife, Gertrude Smitheal, for a divorce, and for custody of a child, Edna Smitheal. Mrs. Gertrude Smitheal cross-acted for a divorce and for custody of the child. The case was tried non jury The trial court rendered a judgment which granted a divorce to each party; the custody of the child, Edna Smitheal, was awarded to Edna Holderness, the paternal grandmother (who was not a party to the suit); the child's mother, Gertrude Smitheal, the appellant here, was granted visitation rights as follows: she was to have the child with her during the summer months from one week after the closing of the public schools of the City of Fort Worth until one week before the opening of the Fort Worth Public Schools, and in addition thereto is to have the child with

her for one-half of the Christmas holidays, and any other weekend when she is able to be in the Fort Worth area provided that it is no more than one weekend visit per month. The mother was ordered to pay $15.00 a week child support. This is an appeal by the mother, Mrs. Gertrude Smitheal, from that decree. The trial court did not file findings of fact and conclusions of law and he was not requested to file any. The father did not appeal.

We affirm.

The first point of error is that the court erred in awarding the custody of the child to Edna Holderness, the paternal grandmother.

We overrule that point.

Appellant's argument is that the court had no legal right to award the custody of her daughter to the paternal grandmother in this case because she, the mother, wanted the child's custody and was not found by the trial court to be an unfit person to have such custody. She argued that in such a case as that it is mandatory that the court award the custody of the child to its parent.

[1] This contention is not the law in Texas. The general rule is that the legal right to the custody of a child rests in the parents. But the courts can terminate that right and award custody of a child to a third party without first adjudging the parents to be unfit, where it is in the best interests of the child to do so. See Gibson v. Hines, 511 S.W. 2d 546 (Waco, Tex. Civ. App., 1974, no writ hist.); McBrien v. Zacha, 351 S.W.2d 101 (Dallas, Tex. Civ. App., 1961, ref., n.r.e.); and Scozzari v. Curtis, 398 S.W.2d 819 (Fort Worth, Tex. Civ. App., 1966, no writ hist.).

[2] And in instances where the parents have voluntarily surrendered custody of their child to a third person and left its custody there for a considerable period of time, as was the case here, and later seek to regain the custody of that

child, the primary question to be decided is what would be for the best interest of the child. Even if a parent was a fit and proper person to have custody he could still lose such a case if it was in the child's best interest that its custody be placed with a third person. McBrien v. Zacha, supra; Lakey v. McCarroll, 134 Tex. 191, 134 S.W.2d 1016 (1940); Dunn v. Jackson, 231 S.W. 351 (Tex. Com. App., 1921, op. ad.); and Herrera v. Herrera, 409 S.W.2d 395 (Tex. Sup., 1966).

[3] Another rule of law applicable in this case is that the decision in a child custody case is a matter that lies within the sound discretion of the trial court. The trial court's decision in the case will not be disturbed on appeal unless the record shows that the trial court abused its discretion in making the custody award. Carter v. Carter, 318 S.W.2d 471 (San Antonia, Tex. Civ. App., 1958, no writ hist.); Herrera v. Herrera, supra; Gibson v. Hines, 511 S.W.2d 546 (Waco, Tex. Civ. App., 1974, no writ hist.); and Taylor v. Meek, 154 Tex. 305, 276 S.W.2d 787 (1955).

In passing we will dispose of another contention that appellant urges in connection with her first point of error.

Article 4639, Vernon's Ann. Texas Civ. St., provides that, "The court shall have power, in all divorce suits, to give the custody . . . of the children to either father or mother, ..."

[4] She contends that the court's action in this divorce case in awarding the child's custody to the grandmother instead of to one of its parents was unlawful and should be set aside because it was in violation of that statute. We overrule that contention.

The following is from Lakey v. McCarroll, supra, 134 S.W.2d at page 1020: "In spite of the fact that Article 4639 only mentions the father and the mother, it is settled that, under the statute just mentioned, and under its constitutional and equity powers, a district court has power, in a divorce decree, to award the custody of the children

of the marriage involved in the divorce action, to a third person, when the welfare of such children requires such action. (Cites cases.)"

And see 20 Tex. Jur. 2d 660, Divorce and Separation, Sec. 331, for a number of other cases holding that appellant's contention is without merit.

[5-7] No findings of fact or conclusions of law were filed in this non jury case by the trial court and the record does not show that any were requested. The law is, that where these facts are true, the appellate court must affirm the judgment of the trial court if it can be upheld on any legal theory that finds support in the evidence. Seaman v. Seaman, 425 S.W.2d 339 (Tex. Sup., 1968), and Crawford v. Boyd, 453 S.W.2d 232 (Fort Worth, Tex. Civ. App., 1970, ref., n. r. e.). In such a case the trial court's judgment implies that all necessary fact findings were made by the trial court in support of the judgment. And in determining whether there is any evidence findings of fact incident thereto, the appellate court can consider only that evidence that is most favorable to the issue and must disregard entirely that which is opposed to it. Renfro Drug Co. v. Lewis, 149 Tex. 507, 235 S.W.2d 609 (1950), and Crawford v. Boyd, supra.

With the above rules in mind we will proceed to set out some of the evidence in the case that tends to support the trial court's award of custody to the grandmother, Edna Holderness.

The plaintiff, William Toby Smitheal, is a black man. The defendant and cross plaintiff, Gertrude Score Smitheal, is a white woman. She is licensed to practice law in Colorado. In 1965 they both lived in Denver where she practiced law. In 1965 they started going together and having sexual intercourse and continued to do so often until their marriage in November, 1969. In 1968 Mrs. Smitheal told Smitheal that he was about to become a father—that she

was pregnant. They then came to Fort Worth and stayed with his mother, Edna Holderness, who lived in Fort Worth. The child was born on November 14, 1968. The birth certificate showed the child's father to be William Theodore Smitheal. Two days after the child was born the mother brought the child to the paternal grandmother's home in Fort Worth. She had stayed there herself for the three months preceding the child's birth in order to keep people in Denver from knowing she was pregnant. The appellant and William Smitheal stayed at Edna Holderness' home about two days after the child was released from the hospital and then both got in a car and returned to Denver, leaving the child in the custody of Mrs. Edna Holderness at her home in Fort Worth. This occurred in November, 1968. Continually, from the child's birth to the present date, the child's home has been with this paternal grandmother. The mother did not want others to know she was having the child. Since its birth Mrs. Smitheal has come to Fort Worth two or three times a year to see the child. Smitheal could not marry the appellant before the child was born because he was already married. Mrs. Smitheal was his lawyer and when she procured Smitheal's divorce they went to Raton, New Mexico, and were married in about November, 1969. Mr. and Mrs. Smitheal did not reside together in Denver because she did not want her parents to know of this marriage. Smitheal and Edna Holderness each testified that Mrs. Smitheal had contributed very little money toward the child's upkeep since its birth. She did send it some second-hand clothes. She never offered to take the child back to Colorado until this suit arose. In November 1972, Mrs. Smitheal came to Fort Worth to live, but she and Smitheal separated in January, 1973, and this divorce suit was filed. Smitheal and his mother have taken care of all of the child's needs—have done all the work. The mother has done no more for the child than to baby-sit and play with it while she was visiting. The paternal grandmother is 76. Her husband is 76. They live in a seven-room house in

Fort Worth with their 22 year old daughter, a college student, and with their son, William Smitheal, the child's father. He is a high school graduate and lacks only 20 hours of having a college degree. Mrs. Smitheal, since sometime after the divorce suit was filed, has started claiming that William Smitheal was not the father of Edna Smitheal. She claims that an ex-convict to whom she was not married, who did legal briefing for her, is the child's father. In the first pleading she filed in this case she stated that Smitheal was the child's father. Smitheal says she did not come to see the child from December, 1971, to the last of September, 1972. He was, during all that time, living at his mother's house and helping support and care for the child.

During the trial Mrs. Smitheal started contending that Smitheal was impotent—that he was incapable of having an erection. On other occasions she admitted that she had intercourse with him and that their sex relations were satisfactory. She sought by that testimony to bolster her contention that Smitheal was not the father of the child.

Smitheal testified that Mrs. Smitheal never did support either him or their child as she has contended.

Edna Holderness testified in substance that: it was over six months after the baby's birth and after Mrs. Smitheal had first returned to Denver before she returned to Fort Worth to see the child; she then stayed for two or three days and it was then around the end of that year (1970) before she returned for her second visit; the child has been with the grandmother in her home since birth (November, 1968) with the exception of seven weeks in the summer of 1973 when a court order in this case allowed the child to visit with Mrs. Smitheal for that period of time; during the entire period after 1968 Mrs. Smitheal would visit the child an average of one or two times a year for two or three days; she would only play with the child while the grandmother did all of the work in caring for her; the mother has never sent the grandmother any money ("not a dime") for the

support of the child; she was 73 at trial time; is in good health; has never asked the mother for money for support of the child; her son, the father of the child, about four months after the child's birth, came to live with her and the child and has lived there ever since; Mr. Smitheal has helped over the years with the care and support of the child; her 22 year old daughter also helps her with the child; the child calls her grandmother Mama.

Smitheal has at all times recognized Edna as being his child. He said he quit a government job that he had had for 25 years in order to bring the mother of the child to Fort Worth to give birth to the child.

Mrs. Smitheal testified that Edna Smitheal's father is one Harry Reach, who researched law for her; she did not know that Reach was an ex-convict when she hired him; she had sex relations with him during 1967 and 1968; she says she returned to Denver after the child's birth so she could practice law and make a living; and that she and Smitheal had sex relations up until the night before he finally left her in January, 1973.

There was also evidence showing that the appellant, Mrs. Smitheal, became the mother of another child, a boy, in 1966, that was also born out of wedlock; a picture of that child is in evidence; Mrs. Smitheal admitted that the only correct statement on that child's birth certificate was the date of its birth; its birth certificate stated that that child was white; Mrs. Smitheal said that she had the birth certificate drawn wrong to protect that child's father, A. D. Williams, a prominent realtor; that the child's name was Shelly; and Mrs. Smitheal said that this child spent the first eight months of its life living with a nurse in Aurora, Colorado.

Shelly's birth certificate showed his father to be one John Chandler.

Marie Williams, the wife of A. D. Williams, testified: she has known Mrs. Smitheal for 20 years; that her husband was not Shelly's father; that Mrs. Smitheal brought Shelly to live with them at six or seven months of age, telling her that Shelly was the son of a rich client of hers and Mrs. Williams agreed to keep the child for $80.00 a month; Mrs. Smitheal only paid her four of such payments and then quit paying; Mrs. Williams has kept the child full time for over five years; the Williams have been that child's sole support for the last five years; and that Mrs. Smitheal did not visit the child while they had it, even though she is its mother.

We recognize the fact that there is testimony in the record from Mrs. Smitheal that contradicts a lot of the testimony that we have hereinabove set out. It is obvious, however, that the trial court did not believe all of the testimony of Mrs. Smitheal. A reading of the statement of facts by an impartial person will readily reveal why the trial court refused to believe a great part of her testimony.

In applying for the birth certificate for Edna, Mrs. Smitheal stated that the father of that child was the plaintiff, William Smitheal. She told Smitheal that he was the child's father. She told her first attorney, Mr. Hooper, the same thing. In the first pleading she filed in this case she alleged that Smitheal was the father of Edna. During the trial, however, she testified that her prior statements to the effect that Smitheal is Edna's father are untrue. She then claimed that Smitheal is not Edna's father and that Harry Reach was the child's father.

To back that contention up she testified that Smitheal was impotent; that he could not have an erection, and thus could not father the child. She on other occasions admitted having intercourse with Smitheal and that her sex relations with him were satisfactory and that they continued until the night before Smitheal left her in January, 1973.

In getting the birth certificate for her other child, Shelly, she named his father as John Chandler. During the trial she had contended that it is untrue that Chandler is Shelly's father and testified that a man who is now dead (A. D. Williams) is the child's father.

The evidence also shows that Mrs. Smitheal appeared before a case worker who investigated this case and that when asked to relate the true facts she gave one story. A few months later she was asked to again relate to this same investigator the facts of the case and the facts she then related varied in a number of ways from the story she first related.

By her own admissions Mrs. Smitheal, in the past, has not always told the truth.

It is easy from this record to tell why the trial judge obviously refused to believe, in many respects, the testimony in the case that was given by Mrs. Smitheal.

From the evidence before it the trial court here would have been justified in believing that Mrs. Smitheal, up until the time the divorce case was filed, had during the major part of their lives, pretty well farmed out the custody of her two children to be reared by others. And one of the best ways to try to find out what a person will probably do in the future is to examine the tracks that he has made in the past.

The evidence would justify the court in believing that the parents voluntarily surrendered custody of this child to its grandmother for a considerable period of time and that it would now be for the best interests of the child to leave its custody with her.

[8] We also hold that the trial court did not abuse its discretion, under the facts of this case, in awarding custody as it did. Cases that we believe support this holding are: Gibson v. Hines, 511 S.W. 546 (Waco, Tex.Civ.App., 1974,

no writ hist.); McBrien v. Zacha, 351 S.W.2d 101 (Dallas, Tex.Civ.App., 1961, ref. n. r. e.); Taylor v. Meek, 154 Tex. 305, 276 S.W.2d 787 (1955); and Scozzari v. Curtis, 398 S.W.2d 819 (Fort Worth, Tex.Civ.App., 1966, no writ hist.).

Appellant's second point of error is that the court erred in applying the No Fault divorce law, since the old law applied at the time the marriage was contracted.

Her contention under this point is that the court erred in applying the "No Fault" Divorce law (V.T.C.A., Family Code, Sec. 3.01) to the facts of this case in determining whether Smitheal was entitled to a divorce from her. She argues that marriage is a contract and that the marriage between these parties was entered into in November, 1969, in Raton, New Mexico. She says that since the marriage is a contract that the law relating to divorce that was in effect at the time of the marriage would have to be applied in determining if Smitheal was entitled to a divorce from her. She says the court erred in applying the new "No Fault" Divorce law in making that determination in this case.

We overrule the point.

[9, 10] The law is that each state, acting through its Legislature, has the exclusive right and power to regulate, control and prescribe and *change* conditions for a divorce of those residing within its territorial limits. 27A C.J.S. Divorce § 8, p. 25. See Pappas v. Pappas, 146 S.W.2d 1115 (Fort Worth, Tex.Civ.App., 1941, no writ hist.) and LeFebvre v. LeFebvre, 510 S.W.2d 29 (Beaumont, Tex.Civ. App., 1974, no writ hist.).

[11] In any event, there is no prejudicial error shown even if the court did apply the wrong law in deciding whether Smitheal was entitled to a divorce.

In this case appellant also asked to be divorced from Smitheal. She urged as grounds cruelty, nonsupport and

adultery. These were grounds for divorce under the old law. The trial court granted her the divorce as she had prayed for. No error that could prejudice her in any way is shown by the fact that the court also granted to Smitheal a "no fault" divorce which also terminated their marriage.

[12] Appellant's third point of error is that since the child was born in 1968 the custody law in effect then should have been applied in determining the rights of the parties to the custody of the child. She says the court erred in applying the law that came into effect after the divorce was filed. We overrule the point.

The law in effect both at the time the child was born and at the time of the marriage was applied by the trial court in determining the question of custody of the child. This is shown by cases hereinabove cited such as Lakey v. McCarroll, 134 Tex. 191, 134 S.W.2d 1016 (1940) and McBrien v. Zacha, 351 S.W.2d 101 (Dallas, Tex.Civ.App., 1961, ref., n. r. e.).

Appellant's point of error No. IV is that the court erred in finding that William Toby Smitheal was the father of the child. We overrule it.

[13] There was ample evidence, some of which is hereinabove referred to, to support the court's finding on this issue. Mrs. Smitheal's own admissions were ample evidence to support that finding.

In her point of error No. V appellant says that the trial court abused its discretion in applying liberal rules of evidence to petitioner's case and in severely limiting respondent's evidence in its findings, and the court ignored many pages of testimony and exhibits. We overrule it. It is of a scatter-barrelled nature. Neither the point nor the argument under it points out any particular evidence that the trial court excluded that it says was so prejudicial as to constitute a reversible error. She does not point out

any prejudicial error committed by the trial court in admitting evidence.

We hold that the record does not show an abuse of discretion by the trial court as is contended in this point of error.

Appellant's sixth point of error is that basic fundamental constitutional rights of a mother and child were violated and disregarded in the trial and decision in the case and there was invidious discrimination. We overrule the point.

During pendency of the suit a visitation schedule had been set up by the court. One one occasion when the child had been returned by its mother after a visit someone advised the judge that the child had bruises on it that could have resulted from molestation of the child. The judge then ordered, without a hearing, that further visitations with the mother be postponed until a hearing be had on it. When a hearing was later had it developed that there was no foundation for the accusations.

Whether this was right or wrong it could not be an error for which this case can be reversed. It did affect the mother's visitations during pendency of the suit, but did not affect the judgment being appealed.

Most of appellant's remaining argument under the point is directed to her contention that the trial court was prejudiced against her because she married William Smitheal. We overrule that contention because the record does not support it.

We have considered all of appellant's points of error that are urged in her brief, and overrule each one of them.

The judgment is affirmed.

HARRIS BREWSTER
Associate Justice

GERTRUDE A. SMITHEAL, *Appellant,*

v.

WILLIAM TOBY SMITHEAL, *Appellee.*

No. 17572.

Court of Civil Appeals of Texas, Fort Worth.

Jan. 24, 1975.

Rehearing Denied Feb. 21, 1975.

Husband sued his wife for divorce and for custody of child and wife cross-acted for divorce and for custody of child. From a judgment entered in the Domestic Relations Court No. 4, Tarrant County, Robert L. Wright, J., wife appealed. The Court of Civil Appeals, Brewster, J., held that general rule is that legal right of custody of child rests in parents, but courts can terminate that right and award custody of child to a third party without first adjudging parents to be unfit, where it is in the best interests of the child to do so; that court's action in awarding child's custody to paternal grandmother instead of to one of its parents was not unlawful as in violation of statute that court shall have power in divorce suit to give custody of children to either father or mother; that trial court did not abuse its discretion in awarding custody of child to maternal grandmother to whom parents had voluntarily surrendered custody of child for considerable period of time; and that court properly applied law in effect at time child was born and at time of marriage determining question of custody of child.

Judgment affirmed.

The Supreme Court Rules of Texas Provide Among Other Things as Follows:

RULE 296 DISTRICT AND COUNTY COURTS

G. Findings By Court

Rule 296. Conclusions of Fact and Law

Upon a trial by the court, the judge shall, at the request of either party, which request shall be filed within ten days from rendition of final judgment or order overruling motion for new trial, state in writing the conclusion of fact found by him separately from the conclusions of law. Notice of the filing of the request shall be served on the opposite party as provided in Rules 21a or 21b. Such findings of fact and conclusions of law shall be filed with the clerk and shall be a part of the record. As amended by order of March 19, 1957, effective Sept. 1, 1957.

Trial of Causes

Rule 299. Omitted Findings

Where findings of fact are filed by the trial court they shall form the basis of the judgment upon all grounds of recovery and of defense embraced therein. The judgment may not be supported upon appeal by a presumption of finding upon any ground of recovery or defense, no element of which has been found by the trial court; but where one or more elements thereof have been found by the trial court, omitted unrequested elements, where supported by evidence, will be supplied by presumption in support of the judgment. Refusal of the court to make a finding requested shall be reviewable on appeal. Amended by order of September 20, 1941, effective December 31, 1941.

Vernons Texas Codes Annotated Provides Among Other Things as Follows:

Art. 4639. [4636-41] Children

A divorce shall not in anywise affect the legitimacy of the children of the parents so divorced. The court shall have power, in all divorce suits, to give the custody and education of the children to either father or mother, as the court shall deem right and proper, having regard to the prudence and ability of the parents, and the age and sex of the children, to be determined and decided on the petition of either party; and in the meantime to issue any injunction or make any order that the safety and well-being of any such children may require. P.D. 3461.

The Family Code of Texas Provides Ground of Divorce as Follows:

CHAPTER 3. DISSOLUTION OF MARRIAGE

SUBCHAPTER A. GROUNDS FOR DIVORCE; DEFENSES

Section 3.01. Insupportability

On the petition of either party to a marriage, a divorce may be decreed without regard to fault if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation.

§ 3.55. Child Custody and Support

Until Title 2 of this code is enacted and takes effect, nothing in this code affects the existing statutes relating to the awarding of custody and support of children in a divorce suit.

2. Section 3.55, Family Code, is amended[80] to read as follows: Sec. 3.55. Managing Conservatorship and Support of Children

Sec. 4.[81] (a) This Act takes effect on January 1, 1974, and governs all proceedings, orders, judgments, and de-

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(Footnotes omitted in printing.)

crees in suits and actions brought after it takes effect, and also all further proceedings in actions then pending, except to the extent that in the opinion of the court its application in an action pending when this Act takes effect would not be feasible or would work injustice. All things properly done under any previously existing rule or statute prior to the taking effect of this Act shall be treated as valid.

(b) Any action or suit commenced after January 1, 1974, that has as its object the modification of an order, judgment, or decree entered prior to January 1, 1974, but which under this Act would be a suit affecting the parent-child relationship, is governed by the provisions of this Act, and shall be treated as the commencement of a suit affecting the parent-child relationship in which no court has continuing exclusive jurisdiction.

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

Dear Sir: March 26, 1975

You are hereby notified that the Application for Writ of Error in the case of GERTRUDE A. SMITHEAL vs. WILLIAM TOBY SMITHEAL was this day filed. No. B-5189.

Very truly yours,

GARSON R. JACKSON, *Clerk*

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

Dear Sir: May 5, 1975

In the case of No. B-5189 SMITHEAL vs. SMITHEAL. We have this date received and filed 4 copies of your Supplemental Record.

Very truly yours,

GARSON R. JACKSON, *Clerk*

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

May 7, 1975

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of B-5189, Gertrude A. Smitheal v. William Troy Smitheal was this day dismissed for want of jurisdiction. Received May 10, 1975.

Very truly yours,

GARSON R. JACKSON, *Clerk*

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

May 21, 1975

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of GERTRUDE A. SMITHEAL v. WILLIAM TOBY SMITHEAL was this day filed.

Very truly yours,

GARSON R. JACKSON, *Clerk*

CLERK'S OFFICE—SUPREME COURT

Austin, Texas

June 4, 1975

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of B-5189, Gertrude A. Smitheal v. William Toby Smitheal was this day overruled.

Very truly yours,

GARSON R. JACKSON, *Clerk*

Vernon's Civil Statutes Provide Among Other Things, as Follows:

COURT—SUPREME

Art. 1728. [1521] [940] [1011] Appellate jurisdiction

The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from appealable judgment of trial courts:

* * *

3. Those involving the construction or validity of statutes necessary to a determination of the case.

* * *

6. In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

APPENDIX

List of Expenditures Showing Interest of Gertrude Smitheal in the Child Edna Smitheal and for the Support of the Family

Bills Paid Description	*Exhibit No.*	*Statement of Facts No.*	*Amount*
Telephone bills paid, itemized list contained in exhibit 3 Average call once a day	Ex. 3	(s 210, 212) (s 214)	$1,669.91
Airline tickets	Ex. 4	(S 210, 212)	1,677.40
Services rendered to William Smitheal in Court in Appeal of matters in his divorce from his third wife Louise Smitheal, which included trips to Washington, D.C. and the wife paid Wm. Smitheal's expenses to come to Washington		(s 219) (s 199)	1,700.00
George Wagner deposition at Washington, D.C. for William Smitheal		(Oral contract of Edna Holderness you take care of Wm. Smitheal—my baby's Denver, Colorado trouble with 3rd wife Louise Smitheal in exchange I will take care of your baby FAIR TRADE—not gratuity. bottom—s(200)	36.00
Check made out by wife to William Smitheal	Ex. 5		100.00
Bible mother gave to Edna Smitheal	Ex. 30	(s 220)	40.00
Furniture wife and William hauled from Denver		(s 196)	1,500.00
Hospital bill when Edna Smitheal was born at Harris Hospital Fort Worth paid by the Mother.	Ex. 29	(s 197)	273.70
Moving expense U. Haul			198.00
$50.00 bad check Wm. Smitheal gave to Gertrude Score Smitheal his wife and attorney and never made good	(ex. 7) Acct 205765	(s 199)	50.00

Bills Paid Description	*Exhibit No.*	*Statement of Facts No.*	*Amount*
Paid expenses for Deposition of George Wagner for William Smitheal from Washington, D.C.	Ex. 1 Ex. 5	(s 201) Court rep Detective Witness fee	36.00 30.00 20.00
		Gertrude trip to Wash. William and baby sent a ticket by G.S. Court fees	300.00 100.00 35.00
		Louise and Bill Smitheal were fighting over a house in Denver, Colorado worth $30,000.00	
		Result on page 207 THE COLORADO LAWYER also in — p 2d — (Pacific reporter for April 1972. (s 206)	
Wife and Mother brought about $500.00 cash to Fort Worth every trip she made.		(s 211) Baby clothing (s 215)	
Gave Edna Holderness from $100 to $150 cash each trip husband unemployed		Baby food (s 216) (s 208) (s 210)	
Wm. Smitheal's letters ask the wife to send cash or bring cash . . . checks are hard for him to cash.	Ex. 26 Ex. 8	(s 211) (s 216) (s 217)	
$500.00 cash to Edna Holderness from Gertrude Smitheal first year before 1969 marriage and Gertrude was working on her baby William Smitheals Denver litigation at the same time.		(2212) (s 212)	$500.00

Excerpt from Statement of Facts on Impairment of Obligation of Contract

(Excerpt 356)

However, it seems to me, Your Honor, that at the time these parties were married, the statute providing the divorce could be granted on the ground that it was insupportable was not the law. In other words, it is a new provision that was not applicable at that time, so when these parties married, it was not a ground for a divorce.

We did establish in this case, that the Petitioner by his own testimony was guilty of adultery, cruelty and non-support. He says he was guilty of adultery in front of the child, and we feel that it is a proper finding that should be made in this case.

Also, the evidence would not be proper. The marriage is insupportable because that was not a ground at the time the parties were married. Under the ruling of the Dartmouth College against Woodward, the parties at the time they married did not marry with the idea a divorce would be granted on the ground it was unsupportable. This new law breaks up a marriage when the mother, we feel, has been guilty of no wrong, has been deprived of the custody of the child, and has done nothing wrong so as to be deprived of the custody of the child. We feel it is unfair she is subjected to a no fault divorce and has proven adultery in the case, and that should be one of the grounds for divorce.

The court: overruled.

Excerpts from the Statement of Facts

Examination of William Smitheal

Q: Page 3, page 352
Q: There is no doubt you have a girl friend.
A: I go around some.
Q: In fact, you have been living over there.
A: I have been visiting over there quite frequently.

Q: You have been going to bed with her in front of this baby, haven't you?

A: No sir.

Q: You know I am going to talk to the baby, and we already have this in the report.

A: Right.

Q: Isn't that a fact?

A: No sir, not in front of the baby. I have more respect for the woman and her children to do a thing like that, Your Honor.

Q: You heard the testimony of the Detective yesterday (Page 353) that you were over there with all the lights out, and the car had been parked there all night.

A: Excuse me, sir, but you can see T.V. a little better with dark or dim lights—

Q: If your child says that she saw you and this woman under the covers, and loving and kissing while you were watching T.V. Are you saying that you little 4 year old girl out there is lying?

A: Sir, I don't think the little girl would say something like that.

Q: Well, she has said it. Is it true, or not.

A: It is not true, sir.

Q: Actually you have never paid one red dime to her (the wife) support have you?

A: No sir.

To illustrate how the Court of Appeals got confused in interpreting this "red dime" in the preceding sentence, said erroneously in its opinion.

> "the mother has never sent the grandmother any money ("not a dime") for the support of the child;"

The dime is the dime Wm. T. Smitheal did not pay. Not the dime the mother is wrongfully charged with not paying.

The heavy expenditures of the mother petitioner are set forth in Exhibit 14 of this Appendix. This irrefutable documentary evidence was entirely disregarded by the trial court and by the Court of Appeals or not ever read. The only explanation is prejudice.